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SUPREME COURT OF THE UNITED STATES

October Term, 1937.

No. 447.

SCHUYLKILL TRUST COMPANY,
Appellant,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

Supplemental Brief of Appellant.

JOHN ROBERT JONES,
Twelve South Twelfth Street,
Philadelphia, Pa.,
Counsel for Appellant.

Lawyers' Book Printing Co., 325 Walnut St., Phila., Pa., Walnut 3781.

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I. Argument.

Because of the time at which copy of the Appellee's brief was received by the appellant the court gave permission to the appellant to file a supplemental brief.

The Commonwealth argues in its brief that the judgment of the state Supreme Court is invalid and should be reversed because it constitutes judicial legislation. Such is the view of the appellant.

The Commonwealth argues that judgment should be entered against the appellant for tax under authority of the Act of June 13, 1907, P. L. 640. The invalidity of such conclusion is discussed in the Brief of Appellant and by the state courts. The state courts held that the 1907 act was unconstitutional upon the same grounds as was the act of April 25, 1929, P. L. 673.

The Commonwealth also argues that the judgment of the state Supreme Court is valid and should be affirmed. This last contention of the Commonwealth denies the validity of the first two as the first two deny the validity of the third.

The Commonwealth says the judgment of the state Supreme Court is valid and should be affirmed

(a) because, says the Commonwealth, "the discrimination complained of by the appellant has been removed and the mandate of this court has been carried out." (Brief for Appellee, p. 2),

(b) because, says the Commonwealth, "The discrimination complained of has been removed by treating United States securities on a parity with Pennsylvania shares." (Brief for Appellee, p. 55).

These assertions of the Commonwealth are not sustained by the Record; they are not facts. The Record

discloses that the United States securities are not treated on a parity with the shares of stock deducted under authority of the language of the 1929 statute. The exempt and deducted shares of stock are, in the language of the statute, "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares,". Such class of exempt and deducted assets includes shares of stock of foreign corporations as well as of Pennsylvania corporations (See list of such shares in the instant case, R. 17), shares of stock of national banks (See R. 17, supra) and Federal Reserve Bank shares (See R. 125, par. (4); R. 126, par. a; See also Commonwealth v. Provident Trust Company, 40 Dauphin Co. Repts. 146; 41 Dauphin Co. Repts. 1; affmd. 319 Pa. 385 (1935).) (A certified copy of the complete opinion of the Dauphin County Court in the cited case of Commonwealth v. Provident Trust Company is among the records of this court, having been filed with permission of this court in the first appeal to No. 3, October Term, 1935. The state Supreme Court affirmed the judgment of the Dauphin County Court in the cited case upon the opinion of the Dauphin County Court. (See Supplemental Brief of Appellant filed in this court to No. 3, October Term, 1935.))

An examination of the method of settlement embodied in the judgment of the state Supreme Court (R. 154; See also R. 126) discloses that national bank shares and Federal Reserve Bank shares are deducted "flat", i. e. at 100 per centum of their actual value from the actual value of the net assets of the trust companies, in all cases and that a portion of the value of United States securities is deducted. (See Brief of Appellant, pp. 32, 33, 56 to 65 incl.) The Commonwealth ignores these facts.

The discrimination against the United States securities is evident. The tax settlement and calculation embodied in the judgment establish conclusively that the United States Bonds, Philippine Islands Bonds and Joint

Stock Land Bank Bonds are subjected to tax, are included in the tax base and that there is an increase of the tax burden by reason of their ownership. The shares of stock exempt by the language of the statute are exempted and deducted so as not to impose double taxation, not to tax them twice. If not to deduct such assets taxes them a second time, of a truth all assets not deducted are taxed. If, as both state courts held and ruled, national bank shares and Federal Reserve Bank shares must be deducted at their full actual value so as not to tax them, must not the full actual value of the United States bonds, the Philippine Islands bonds and the Joint Stock Land Bank bonds owned by the appellant be deducted so as not to tax them, must not the full value of all exempt and non-taxable assets be deducted so as not to tax them and not to discriminate against them?

If by the phrase, "Pennsylvania shares", the Commonwealth means shares of stock issued by Pennsylvania corporations, treating United States securities on a parity with such Pennsylvania shares under the "proportionate" method of settlement applied in the instant case does not remove the discrimination against such securities, does not relieve them from taxation, does not exclude them from the tax base. Such treatment of United States securities makes the non-taxability of the United States securities dependent in the case of each trust company upon the fact of ownership of Pennsylvania shares, the value of such shares and their proportionate relationship to the book value of so-called "permanent investments" less the full book value of national bank shares, Federal Reserve Bank shares and all other assets deducted at their full value. (See R. 105, 126, 154.) The deduction of the United States securities and the extent of the deduction are made to depend upon the kind and amount of the assets owned by each trust company. One trust company may receive in one year a deduction of the full value, another a deduction of 10 or 20 per centum of the full value

though the value of the United States securities and the net assets of each be the same. The succeeding year the same trust companies with the same value of United States securities may receive each an entirely different amount of deduction for the said United States securities, the amount being dependent upon the amount of its liabilities, deposits, the value of other deductible assets, whether or not they are "permanent investments" and whether or not the deduction be by the "flat" or "proportionate" method. United States securities are exempt under federal law and such exemption cannot be made dependent upon the application of a state statute.

It is evident upon a reading of the judgment entered in the instant case that United States securities are included in the denominator of the fraction (R. 102, 104, 153; Brief of Appellant, pp. 58, 59), are included in the tax base, that there is an increase of the tax liability by reason of the trust company's ownership of such United States securities and that but a portion of their value is deducted while 100 per centum of the value of national bank shares are deducted. That a deduction of any asset under the "proportionate" method of settlement does not lessen tax liability to the extent of a "flat", i. e. full-value deduction, is self-evident.

If, as the Commonwealth contends, parity of treatment removes discrimination, why were the United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds not deducted on a parity with national bank shares and federal reserve bank shares which are included within the class of exempt shares of stock exempt under the language of the statute and deducted at their full value so as not to tax them? There is not a word in the Commonwealth's Brief in explanation of this manifest discrimination against and taxation of these non-taxable bonds.

At the oral argument reference was made to the statement that 19 per centum of the value of the exempt shares

of stock and United States securities exclusive of national bank shares were deducted and that therefore, argued the Commonwealth, there was an equality of deduction and a parity of treatment with consequent removal of discrimination. It so happens in the instant case that there was very little difference between the amount invested in the exempt shares and the amount invested in the exempt bonds. (R. 17.) The 19 per centum is approximately the amount of the proportionate deduction of these assets exclusive of the national bank shares, the amount deducted, $55,541., being approximately 19 per centum of the multiplicand of the calculation applied. (See R. 154; Brief of Appellant, p. 58.) That equality in the amount deducted other than a deduction of the full value and that parity of treatment by applying to two members of the class of exempt assets the "proportionate" method of settlement do not remove the discrimination and do not exclude the exempt bonds from the tax base is established by the judgments of the state courts by their deduction of the full value of two other members of the class of exempt assets, to wit, federal reserve bank shares and national bank shares and by the fact that the exempt bonds deducted under the "proportionate" method of settlement are included in the denominator of the fraction and the multiplicand in the calculation made in the application of the "proportionate" method of settlement. (See Brief of Appellant, pp. 58, 59.)

It is submitted that parity of treatment with assets deducted "proportionately" does not remove discrimination against and the taxation of the United States Bonds, Philippine Islands Bonds and Joint Stock Land Bank Bonds.

As stated in the Brief of Appellant filed with the court, if the tax imposed by the statute and applied by the tax settlement made against the appellant is a tax against shares qua shares, a personal levy against the shareholders,

a tax upon the property of the owner of the shares, the state is without constitutional authority to impose such tax upon the shares owned by non-residents of the state. The appellant referred to and called the attention of this court to the Brief of Appellant filed with this court in the appeal to No. 3, October Term, 1935. The state Supreme Court in its new opinion filed June 25, 1937 did not discuss this question but simply adhered to its conclusion set forth in the opinion of Mr. Justice Frazer filed June 30, 1934, (R. 73) (315 Pa. 429), and therefore the views of the state Supreme Court as expressed therein must be considered.

As stated in the Brief of Appellant filed in the first appeal, the state court in its determination of this question ignored the fact that prior to the passage of the Act of June 13, 1907, Pamphlet Laws, 640, trust companies were taxed upon their capital stock and that it so decided in the cases of Commonwealth v. Mortgage Trust Company, 227 Pa. 163 (1910) and Commonwealth v. Union Trust Co., 237 Pa. 353 (1912). The state court ignored the fact that the appellant was incorporated and that its Letters Patent were issued October 17, 1887, upwards of twenty years before the passage of the said act of 1907, supra. (R. 19) It is established as a fact that upwards of twenty years before the passage of the said act of 1907 this appellant was subjected to the capital stock tax and that under the law of Pennsylvania "shares of stock in a Pennsylvania corporation held by a corporation or individual domiciled in another state" could not "be taxed here". Com. v. Standard Oil Co., 101 Pa. 119, 148, 149 (1882).

It is submitted therefore that the distinction which is drawn by the statement of the state court that the case of Com. v. Standard Oil Co., supra, was a capital stock tax case and "does not impinge upon our decision here" is contrary to the law of Pennsylvania as theretofore declared by such court. So likewise, it is submitted, is the distinction attempted to be drawn with reference to its decision in the

case of Dupuy v. Johns, 261 Pa. 40 (1918) upon the grounds that it relates to the personal property tax levied under the Act of June 17, 1913, P. L. 507, and therefore is not in point here.

Shares of stock are personal property. The decision of the state court affirms such law. A share of stock is a share of stock whether it is subjected to tax under the Act of June 17, 1913, supra, or under the act of 1929 as held in the instant case and therefore the definition of a share of stock and the constitutional limitation upon the authority of the state to tax a share of stock declared by the state court in such decision is in point. Under the instant decision the tax is held by the state court to be a property tax, for the court has held it is a tax upon the shares in the hands of the shareholders though it determines the tax by applying a millage rate to the value of certain assets of the corporation, not to the value of the shares. It is submitted that there is nothing in the act of 1907, supra, and its amendments including that of 1929 in question in the instant case which changed either the nature of a share of stock or the constitutional limitation upon the power of a state to tax it.

The said Act of 1907 was a revenue statute imposing a property tax. It was not a statute regulating the issue of shares of stock by domestic trust companies or imposing a tax upon the issue of the stock of such corporations; it was not a statute imposing a stock transfer tax in exercise of the power of a state "to control and condition the operations of the corporation which it creates". The opinion of the state supreme court in the instant case declares that the said Act of 1907 as it was last amended by the said Act of April 25, 1929, Pamphlet Laws 673, imposed a tax upon the shares of stock issued by trust companies in the hands of the stockholders, imposed a tax upon the interest of the shareholders, thus interpreting and construing the statute as imposing a tax upon such intangible personal property of the stockholders. This being true, the question upon

this point of the appeal is whether or not a state has the power to impose a property tax consisting of a tax upon the interest of the stockholders in a corporation created by the state in the cases of stockholders who are non-residents of such state. The Supreme Court of Pennsylvania heretofore recognized the lack of such power in prior decisions which it has not overruled. (See Commonwealth v. Standard Oil Co., 101 Pa. 119, 148, 149 (1882)). As to the identity (for purposes of taxation) of the capital stock of a corporation and the shares of stock issued by it see Commonwealth v. Fall Brook Coal Co., 156 Pa. 488, 494 (1893); Commonwealth v. Penna. R. R. Co., 297 Pa. 308, 314 (1929). (See also Commonwealth v. Eastern Securities Co., 309 Pa. 44 (1932); Dupuy v. Johns, 261 Pa. 40 (1918); Callery's Appeal, 272 Pa. 255 (1922).)

It is submitted that the decisions of this court in the cases of Delaware, Lackawanna & Western R. R. Co. v. Commonwealth of Pennsylvania, 198 U. S. 341 (1905), Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930) and First National Bank of Boston v. Maine, 284 U. S. 312 (1932) deny the authority of any state to impose a tax upon property which is located beyond its jurisdiction.

This court in the case of Corry v. Baltimore, infra, upon which the state court relies as establishing the authority of the state of Pennsylvania to impose a tax upon shares of stock held by non-residents of the Commonwealth, declared that a state had such power if the state in creating the corporation provided that such state should be the situs of the shares for taxation. There is no provision in the law of Pennsylvania in creating trust companies which made it a condition of the issuing of the shares of stock that the situs of such shares of stock for taxation purposes is this state irrespective of the owner's domicile. To make the cited decision applicable as the declaration of the authority of a state to tax shares of stock it must first be established that the corporation which issued the shares of stock was created with such condi-

tion attached to the issue of the shares of stock and that the law of the state made this state the situs for such taxation. The facts are to the contrary and it is submitted therefore that the citation of authority is not in point.

The state court said in its opinion in support of its conclusion that the tax imposed by the act of 1929 is a tax upon shares in the hands of residents and non-residents:

> "The principle that shares of stock of a corporation may be taxed by the state of incorporation whether in the hands of residents or non-resident owners is clearly upheld in Corry v. Baltimore, 196 U. S. 466, where it is said, pages 476, 477: '* * * the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein, and * * * a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation.'"

The quotation from the cited decision is incomplete. The omitted portion shows expressly that the portion quoted was the principle "concerning the taxation by the States of stock in national banks", the power of a State to tax such shares being given by the Congress of the United States. Immediately following the quotation contained in the opinion of the state court is the application of the principle (p. 477). This court said:

> "Applying this principle, it follows that a regulation of that character, prescribed by a State, *in creating a corporation* is not an exercise of the taxing power of the State over persons and things not subject to its jurisdiction." (Italics mine.)

The application of the principle is dependent upon the fact that the state prescribed a regulation "in creating a

corporation" that the situs of the shares of stock was the domicile of the corporation. Such is not the fact under the law of Pennsylvania. Such fact situation not existing, the cited principle has no application. This Court in the cited decision declared that the liability of a non-resident stockholder for a tax upon the shares of stock issued by a corporation exists only when under the law of the state there is a regulation fixing the domicile of the corporation as the situs of the shares for tax when the corporation was created, such regulation being expressed in the charter or being in existence in the general laws of the state "at the time the corporation was created" or at the time there was an "extension of the charter" of the corporation. None of these facts existed in the state of Pennsylvania at the time this corporation was created. It is beyond dispute that at the time the corporation was created trust companies were subjected to a capital stock tax. It is undisputed under the decisions hereinbefore cited in the cases of Com. v. Mortgage Trust Co., 227 Pa. 163 (1910) and Com. v. Trust Co., 237 Pa. 353 (1912) that the act of 1907 was a revenue statute imposing a property tax as was each one of its amendments. It was not a statute regulating the issue of the shares of stock and if it were it could have no application to the appellant-corporation which was created before its enactment. The state court held expressly in the cited case of Com. v. Mortgage Trust Co., 227 Pa. 163, that the act of 1907 was a revenue measure. In its opinion the state court outlined the history of the legislation, the taxation relating to trust companies and the policy of the Commonwealth in relation thereto. In the second opinion filed by the court in the cited case it was expressly held that "the Act of 1907 did not provide a new system of taxation, nor did it introduce new taxable subjects. It was a revenue statute . . ." (183). If, now, prior to the passage of the act of 1907 trust companies were taxed upon their capital stock and the act of 1907 did not provide a new system of taxation, did not introduce new taxable subjects and was

a revenue statute, how can it be said in reason and in justice that it was a regulation fixing this state as the situs for the taxation of shares of stock of domestic corporations irrespective of the place of residence of their owners? If, as is settled law, shares of stock issued by domestic corporations were not made subject to tax when owned by a non-resident of Pennsylvania, corporate or individual, prior to the act of 1907 and the act of 1907, as the state court held, did not introduce new taxable subjects, did not provide a new system of taxation, how can it be held that this revenue statute of 1907 and its amendment of 1929 regulated the issue of the shares of stock and made the shares of stock of domestic trust companies subject to tax when owned by non-residents?

It is submitted that the prerequisites to make the decision of this court in the cited case of Corry v. Baltimore, supra, pertinent to the instant case do not exist and that therefore such decision does not support the conclusion of the state court.

The conclusion of the state court is negatived by the later decisions of this court which it cites, namely, Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930) and First National Bank of Boston v. Maine, 284 U. S. 312 (1932). The distinction made by the state court that these cited cases concern the imposition of "transfer inheritance tax upon choses in action at the death of the owner and can have no application here" is without foundation, for, as the cited cases show, whatsoever be the nature of the tax, whether a capital stock tax, a personal property tax or a transfer inheritance tax, the property must have a situs within the state which imposes the tax before such property can be taxed, directly or indirectly, before such property can be considered in the determining of the amount of the tax to be paid. In the first cited case it was expressly held (280 U. S. 212) that intangibles may be taxed at the domicile of their owner and that there is no reason for saying that they are not entitled to enjoy immunity from tax-

ation. The principle of mobilia sequuntur personam applies and therefore intangible personal property can be taxed only at the domicile of their owner, otherwise there is a violation of the due process of the law and the equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. This conclusion was reaffirmed and strengthened in the later case of First National Bank of Boston v. Maine, supra, wherein it was held that the ownership of shares of stock by the stockholder, which the state court says in the instant opinion is the subject of the tax under the Pennsylvania act of 1929, "is an individual interest giving the stockholder a right to a proportional part of the dividends and the effects of the corporation when dissolved, after payment of its debts . . . And this interest is an incorporeal property right which attaches itself to the person of the owner in the state of his domicile." (329, 330)

It is respectfully submitted that the exclusive situs for the taxation of shares of stock is the domicile of their owner and that the taxation by the state of Pennsylvania of shares of stock owned by non-residents of the state is forbidden by the Fourteenth Amendment to the Constitution of the United States.

The Commonwealth's brief discloses that it holds to the conclusion that the statute as amended by the state Supreme Court imposes a tax upon the shares as shares though it argues that the amendment of the statute by the state court constitutes judicial legislation and is therefore void.

The amendment of the 1929 statute by judicial legislation allowing additional deductions emphasizes the fact that the tax is a tax upon assets of trust companies and not upon the shares issued by them, not upon the interest of the shareholders.

Under the statute as it was enacted by the legislature

the sole deductions allowed were "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares". These deductions were allowed because under the law of Pennsylvania shares of stock issued by a corporation and the capital stock which gave value to the shares of stock were regarded as identical for taxation purposes and therefore the deduction of the shares of stock of corporations liable to pay a capital stock tax or tax on shares was allowed so as not to impose double taxation. The reduction of the shares of stock of corporations relieved from the payment of capital stock tax or tax on shares was allowed pursuant to the taxation policy of the Commonwealth whereby manufacturing corporations, laundering corporations and meat-packing corporations were relieved from the payment of capital stock tax or tax on the shares of such corporations. The deductions were allowed in order to exclude the assets thus deducted from the taxation which the legislature held resulted from the imposition of the tax under the statute without the deductions. It has been so declared by the state courts and by this court in the opinions filed in the instant case. (R. 56, 57, 58, 81.)

If the amendment of the 1929 statute by the state courts be valid then additional deductions are to be allowed and these additional deductions in the language of the state courts are deductions of all assets over which the state has no taxing jurisdiction. (R. 120.) The allowance of such additional deductions is a recognition of the fact that the tax is imposed upon the assets of the trust company and that a failure to deduct them, to remove them from the measure of the tax, taxes them and discriminates against them and in favor of the assets which are deducted. Howsoever the statute may have been viewed before its amendment by the state courts the allowance of additional deductions consisting of assets over which the state has no taxing jurisdiction, assets which are, as the state court puts it, "constitutionally exempted" (R. 119), assets which are

"exempt under the Constitution of the State or of the United States" (R. 120) conclusively establishes the fact that the statute does not impose a tax upon the shares issued by the trust company but upon the assets of the trust company which are not deducted.

The ground upon which deductions are allowed runs counter to any conception of a taxation of the shares issued by the trust company. The taxation of shares of stock is a taxation of the share-owners' property and has always been regarded as not being a tax upon the assets which give value to the shares. In the case of Dupuy v. Johns, 261 Pa. 40, 46 (1918), the state court said:

> "The tax on stock of a foreign corporation, eo nomine, in the hands of resident shareholders, is not a tax on the property represented by the capital of the corporation, but is a personal levy against the shareholder in question, based on the value of his stock, without any intent to reach the property that gives the latter its value (McKeen v. Northampton Co., 49 Pa. 519; Whitesell v. Northampton Co., 49 Pa. 526; see also note to Com. v. Westinghouse Airbrake Co., 151 Pa. 276, 281), and this is the sole ground upon which such tax is sustainable." (See R. 40.)

This definition of what constitutes a tax upon shares of stock and the distinction between the capital stock tax and the tax upon shares are recognized and expressly affirmed by the decision of the state court in the later case of Callery's Appeal, 272 Pa. 255 (1922).

The basis of the decision in the cited case of Dupuy v. Johns, 261 Pa. 40, (1918) is that a share of stock is property entirely separate and distinct from the corporate property, when taxed as a share it is indivisible and that unless it be such species of property the jurisdictional power of the Commonwealth to tax shares of stock owned by a resident of Pennsylvania when such shares of stock are issued by

foreign corporations which do no business in the state and have no property in the state does not exist. These decisions are not overruled by the state supreme court (R. 40, 73, 187.)

To constitute the taxation of shares of stock qua shares, the tax must be upon the share-owner's interest without diminution by reason or on account of the kind of property which constitutes the capital stock of the corporation which issued the shares. Shares of stock of equal value must be taxed equally; their taxation cannot vary by reason of the character of the assets which give them value. In the taxation of shares the tax liability cannot constitutionally be made to vary as the kind of assets of the corporation varies, while the interest of the shareowner remains the same and the value of the share is unchanged.

It is obvious that the moment consideration is given to the nature and character of the property which gives value to the shares of stock by way of eliminating from consideration certain assets of the corporation which give value to the shares, and giving consideration solely to other assets, that moment shares of stock are not taxed as shares of stock.

For generations the taxation of shares of stock in Pennsylvania, whether such taxation was by the Commonwealth as a state tax or by the counties as a local tax, and every decision upon the subject by the state supreme court were predicated upon the proposition that a share of stock is an indivisible entity, a species of property distinct from the assets which give value to it, owned by the shareholder and not the corporation which issued it, and that the tax was a personal levy upon the shareholder and therefore was imposed without any intent to reach assets owned by the corporations in any manner whatsoever.

In the case of Van Allen v. The Assessors, 70 U. S. 573 (1886) the taxation of the shares of national banks in the hands of stockholders, the capital of which banks was invested in stocks and bonds of the United States, was sus-

tained upon the ground that the entire share, the entire interest of the shareholder in the share was the subject of the tax (588). The court reaffirmed the principles which had been established by its decisions: "(1) that States cannot tax the agencies of the national government; (2) that States cannot tax the national securities in the hands of the individual citizens; (3) that States cannot tax the national securities in which may be invested the whole or a part of the capital of any association or corporation." (594)

In speaking of its decision in the Van Allen case, supra, this court said in the case of Cleveland Trust Co. v. Lander, 184 U. S. 111, 114 (1902):

> "The validity of the statute was sustained, and interpreting it the court said that it authorized the taxation of such shares, and *shares were defined to be the whole interest of the holder without diminution on account of the kind of property which constituted the capital stock of the bank.*" (Italics mine.)

In the case of First National Bank of Louisville v. Kentucky, 9 Wallace, 353 (1870) it is said on page 360:

> "It is clear that it is the shares owned or held by individuals in the banking corporation which are to be taxed, and the measure of the tax is fifty cents per share of one hundred dollars. These shares may, in the market, be worth a great deal more or a great deal less than their par or nominal value, as its capital may have been increased or diminished by gains or losses, *but the tax is the same in each case. This shows that it is the share which is intended to be taxed and not the cash or other actual capital of the bank.*" (Italics mine.)

Under the Act of 1929 the tax is not "the same in each case."

Under the Act of 1929 the kind of assets owned by the trust company determines not only the amount of the

tax to be paid but also whether or not any tax whatsoever is to be paid irrespective of the actual value of the shares of stock. *The factor which determines what tax, if any, is to be paid is the value of the assets of the trust company which the act says are exempt. Tax liability is determined by the kind of assets which the trust company owns, not by the interest of the shareholder.*

Is it not a fact that under the settlement made against the appellant the amount of tax required to be paid is greater by reason of the appellant's ownership of United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds than it would have been if the appellant had not owned them or if the amount invested in such bonds had been invested in federal reserve bank shares, does not such tax settlement infringe the immunity from taxation of such bonds and is not the settlement invalid under the decision of this court in the case of Missouri v. Gehner, 281 U. S. 313 (1930)?

The foregoing conclusion is not affected by the fact that the corporation may collect this tax from the shareholder. The method of collecting the tax does not determine the nature of the tax. The fact that the law requires the corporation to pay the tax evidences the relationship of the corporation to the tax. In the last analysis the effect of every corporate tax to be paid is to require the shareholder to make payment thereof, for there can be no issue of a lawful dividend to a shareholder unless there be a net income or profit to be distributed and there can be no profit or net income until current indebtedness is first paid or provision for its payment made. Com. v. Penna. R. R. Co., 297 Pa. 308.

We now find that every deduction which is required to be made under the statute as amended by the court is one which is required to be made when the tax is imposed upon the assets of the trust company. Before the enactment of the Act of June 13, 1907, P. L. 640, trust companies were taxed upon their capital stock, i. e. their assets

in the same manner as private business corporations (Commonwealth v. Mortgage Trust Company, 227 Pa. 163 (1910); Commonwealth v. Trust Company, 237 Pa. 353 (1912).) Under such tax the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, national bank shares and federal reserve bank shares are all deducted at their full value. They are so deducted because the state has no jurisdiction to impose tax upon them, the capital stock tax being a tax upon the property of the corporation. (Commonwealth v. Standard Oil Co., 101 Pa. 119, (1882); Commonwealth v. Fall Brook Coal Co., 156 Pa. 488 (1893); Commonwealth v. Penna. R. R. Co., 297 Pa. 308, 314 (1929); Commonwealth v. Eastern Securities Co., 309 Pa. 44 (1932).)

There is now no distinction between the tax which was imposed upon trust companies before the enactment of the 1907 act and the tax imposed under this amended act of 1929. The deductible assets are the same in character. The tax imposed by this amended act is a tax upon shares in name only. It is submitted that if the 1929 act as amended be constitutionally valid, if such amendment of the statute be not judicial legislation, the tax imposed is not a tax upon the shares of stock issued by the trust company but is a tax upon the assets of the trust company and therefore, as in the case of other domestic private corporations made subject to the capital stock tax, United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds must be deducted at their full value as the state court under the amended statute has deducted at their full value national bank shares and federal reserve bank shares.

If the statute as amended by the state court be valid, the judgment of the state court is not valid for the hereinbefore recited reasons. If the statute as amended by the state court be valid, the proper method of taxation in order to construe the state statute in conformity with the acts of Congress and the Constitutions of Pennsylvania

and of the United States and thus carry out the intent of the state legislature as now declared is to determine the taxable value to which the rate of tax is to be applied by deducting from the total assets an amount of assets sufficient to cover liabilities, (R. 78. See also Commonwealth v. Trust Co., 237 Pa. 353, 356 (1912)) the full value of shares of stock of corporations exempted under the statute, including therein the full value of the national bank shares and federal reserve bank shares (R. 82) and the full value of the United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds. When such method is applied the amount of the tax is $570.43, which the appellant paid (See Brief of Appellant, pp. 13, 34, R. 59). Judgment therefore should be directed to be entered in favor of the appellant with costs.

II. Conclusion.

To add words of limitation to the 1929 statute (which the state court has done) and to strike from the 1907 statute its second proviso (which the Commonwealth argues this court should do), each is judicial legislation. The state court admits the unconstitutionality of the 1929 statute and avers that it allows the additional deductions for the purpose of removing its unconstitutionality (though in point of fact its method of tax settlement and consequent judgment do not do so).

That judicial process cannot make the 1929 statute constitutional without violating the mandate of the Supreme Court of the United States is evident. The validity of this conclusion the Commonwealth knows and admits and the General Assembly affirms by the Act of July 28, 1936, P. L. 73.

Legislation is the function of the law-making body created by the state constitution not that of the courts.

The new judgment of the state court entered under the alleged authority of the 1929 statute as the state court has amended it, violates the decision and mandate of this court.

The statute as amended by the court is unconstitutional and void upon the same grounds as is the statute as it was enacted by the legislature. There is a discrimination against and taxation of United States securities and the securities of federal agencies and instrumentalities, an inclusion of such non-taxable assets in the tax base and an increase of tax burden by reason of the trust company's ownership of such non-taxable assets.

It is submitted that the judgment of the state Supreme Court should be reversed with directions to enter judgment in favor of the appellant with costs.

JOHN ROBERT JONES,
Counsel for the Appellant.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

SCHUYLKILL TRUST COMPANY, Appellant

v.

THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR APPELLEE

CHARLES J. MARGIOTTI,
Attorney General

MANUEL KRAUS,
Deputy Attorney General,

EDWARD FRIEDMAN,
Deputy Attorney General

Attorneys for Appellee.

State Capitol,
Harrisburg, Pa.

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APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR APPELLEE

Reference to the Official Reports of the Opinions Delivered by the Courts Below.

The opinions of the Court of Common Pleas of Dauphin County delivered by President Judge Hargest are reported in 42 Dauphin County Reports, 317; 43 Dauphin County Reports, 258 (R. 100).

The opinion of the Supreme Court of Pennsylvania, delivered by Mr. Justice Stern is reported in 327 Pa. 127, (R. 187).

SUMMARY

The Commonwealth contends and believes that it has conclusively established in the discussion in this brief that the Trust Company Act of June 13, 1907, P. L. 640, is a valid tax on shares and that the amendments to this act having been declared discriminatory, and by reason of such discrimination, unconstitutional, they are void and can have no effect upon the act of 1907.

The Schuylkill Trust Company is subject to tax for the year 1930 in pursuance to the provisions of said act, allowing no deductions whatsoever from its capital stock, surplus and undivided profits and that all of the shares of stock issued and outstanding, whether in the hands of residents or nonresidents, are subject to tax.

If this position of the Commonwealth is untenable, then the discrimination complained of by the appellant has been removed and the mandate of this court has been carried out.

ARGUMENT

I

Facts

This case is an appeal of the Schuylkill Trust Company from the judgment of the Supreme Court of Pennsylvania affirming a judgment of the Court of Common Pleas of Dauphin County in the matter of the tax on shares imposed on the Schuylkill Trust Company for the twelve months ending December 31, 1930.

The issues raised in this case involve the construction of the decision by the Supreme Court of the United States in the case of SCHUYLKILL TRUST COMPANY, APPELLANT *v.* COMMONWEALTH OF PENNSYLVANIA, 296 U. S. 113 (R. 76).

A tax on shares for the year 1930 was settled against the Schuylkill Trust Company by the fiscal officers of the Commonwealth and an appeal was taken to the Court of Common Pleas of Dauphin County to No. 61 Commonwealth Docket, 1933.

During the tax year in question, the Schuylkill Trust Company owned United States securities, Philippine Islands bonds, joint-stock land bank bonds, shares of national banks and shares of stock of Pennsylvania corporations paying a capital stock tax or tax on shares for which it claimed a deduction in arriving at the taxable value of its shares.